Supreme Court, U.S.
FILED

95 • 472 SEP 20 1995

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

HARRY D. HASTINGS,

Petitioner,

vs.

SMALL BUSINESS ADMINISTRATION,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN W. McKENDREE
Counsel of Record
LAW OFFICES OF
JOHN W. McKENDREE
Attorneys for Petitioner
1244 Grant Street
Denver, Colorado 80203
(303) 861-8906

7377
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

62 pp

QUESTION PRESENTED

Whether the Merit Systems Protection Board has subject matter jurisdiction to hear Hastings' appeal for his constructive discharge claim for his claims alleging constructive discharge on the basis of prohibited personnel practices, when the Agency never notified Hastings of his right to appeal his constructive discharge claim with the Merit Systems Protection Board, despite the fact that Hastings lost a civil lawsuit in the United States District Court for the District of Colorado?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Citations	ii
Opinions Below	1
Statement of Jurisdiction	1
Statutes and Regulations Involved	1
Statement of the Case	3
Jurisdictional Basis of the Court of Appeals	4
Reasons for Granting the Writ	4
The Court of Appeals' decision presents an issue of substantial federal importance which has not, but should be, determined by this Court.	4
Conclusion	9

TABLE OF CITATIONS

Cases Cited:

Colon v. Chairman of Bd. of Directors of Fed. Deposit Ins. Corp., 723 F. Supp. 842 (D.P.R. 1989)	7

Contents

	Page
Connor v. United States Postal Service, 15 F.3d 1063 (Fed. Cir. 1994)	5, 6, 7, 8
Covington v. Dept. of Health & Human Serv., 750 F.2d 937 (Fed. Cir. 1984)	5
Dawson v. U.S. Postal Serv., 45 M.S.P.R. 194 (1990)	5, 6
Fuentes v. U.S. Postal Serv., 54 M.S.P.R. 4 (1992)	5
McCandless v. Merit Systems Protection Bd., 996 F.2d 1193 (Fed. Cir. 1993)	8
Schultz v. United States Navy, 810 F.2d 1133 (Fed. Cir. 1987)	5
Smith v. Dept. of Transp., F.A.A., 25 M.S.P.R. 80 (1984)	5
Waldau v. Merit Systems Protection Bd., 19 F.3d 1395 (Fed. Cir. 1994)	5
Walton v. Dept. of Navy, 42 M.S.P.R. 244 (1989)	4
Statutes Cited:	
5 U.S.C. § 2302(b)	8
5 U.S.C. § 7702	1, 5
5 U.S.C. § 7703	4

Contents

	Page
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1295(a)(9)	4
Other Authorities Cited:	
5 C.F.R. § 1201.21	1, 2, 5, 6
29 C.F.R. § 1613.403	5, 6
29 C.F.R. § 1614.403	2
Ernest C. Hadley, *A Guide to Federal Sector Equal Employment Law & Practice 1979-1992* (5th ed. Dewey Pub. 1992)	6
APPENDIX	
Appendix A — Judgment of the United States Court of Appeals for the Federal Circuit Filed June 21, 1995	1a
Appendix B — Initial Decision of the United States of America Merits Systems Protection Board, Denver Field Office Dated May 19, 1994	3a
Appendix C — Order of the United States of America Merit Systems Protection Board, Denver Field Office Dated April 1, 1994	10a
Appendix D — Order and Judgment of the United States Court of Appeals for the Tenth Circuit Filed February 14, 1994	13a

Contents

	Page
Appendix E — Order and Judgment of the United States District Court for the District of Colorado Filed March 11, 1993	16a
Appendix F — Order of the United States of America Merit Systems Protection Board Dated September 15, 1994	33a
Appendix G — Petition for Review Filed October 19, 1994	37a
Appendix H — Relevant Statute	39a

OPINIONS BELOW

The decision of the Court of Appeals for the Federal Circuit was without opinion, it may be found at 49 F.3d 182 and appears in Appendix A hereto, the Final Decision of the Merit Systems Protection Board was also without opinion, and may be found at 64 M.S.P.R. 220, and appears in Appendix F hereto.

STATEMENT OF JURISDICTION

The Court of Appeals' judgment and opinion was dated and entered of record on June 21, 1995, affirming the judgment of the Merit Systems Protection Board. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations are involved in the case:

5 U.S.C. § 7702 (App. H).

5 C.F.R. § 1201.21

> When an agency issues a decision notice to an employee on a matter that is appealable to the Board, the agency must provide the employee with the following:
>
> (a) Notice of the time limits for appealing to the Board, the requirements of § 1201.22(c), and the address of the appropriate Board office for filing the appeal;
>
> (b) A copy, or access to a copy, of the Board's regulations;

(c) A copy of the appeal form in appendix I of this part; and

(d) Notice of any right the employee has to file a grievance.

29 C.F.R. § 1614.403 Election.

An aggrieved person may initially file a mixed case complaint with an agency, pursuant to this part, or (s)he may file a mixed case appeal directly with the MSPB, pursuant to 5 CFR 1201.151, but not both. An agency shall inform every employee who is the subject of an action which is appealable to the MSPB and who has raised the issue of discrimination either orally or in writing, during the processing of the action, of his/her right to file a mixed case complaint, if the employee believes the action to be based, in whole or in part, on discrimination, or to file a mixed case appeal with the MSPB. The person shall be advised that (s)he may not initially file both and that whichever is filed first (the mixed case complaint or the appeal) shall be considered an election to proceed in that forum. For the purposes of this subsection, filing of a mixed case complaint occurs when the complaint is filed with an appropriate agency official, in accordance with § 1613.214(a) (3) of subpart B of this part.

STATEMENT OF THE CASE

Harry D. Hastings began employment with the Small Business Administration (Agency) in August 1976 in the Denver Regional Office. (App. E at 16a). For six years, beginning in 1980 through December of 1986, Hastings worked as a Surety Bond Officer for the Agency. (*Id.* at 16a-17a). Beginning in May of 1985, Hastings experienced hostile and abusive treatment at work, "including delays in reviewing his work that caused his performance evaluations to suffer, and public abuse . . . in the presence of his coworkers." (*Id.* at 18a). As a result of these intolerable working conditions, Hastings was forced to retire effective December 31, 1986. (*Id.*).

At the time of his alleged retirement, Hastings had filed several discrimination complaints as a result of the treatment he received prior to retiring. (App. B at 4a). "He filed two more complaints in December 1986 and January 1987 but neither was accepted." (App. E at 19a). However, in 1991, five years after his forced retirement, the Equal Employment Opportunity Commission determined that the Agency "had ignored Hastings' alleged constructive discharge issue and remanded it to the [Agency] for EEO counseling." (*Id.*). The Agency, in January 1993, dismissed the complaint on the grounds that it was untimely filed. (App. B at 4a; App. E at 19a). However, at no time, from the time of his initial attempt to bring the complaint in December 1986 until the filing of this appeal with the Merit Systems Protection Board (MSPB) did the Agency ever provide Hastings with any notice that he had a right to appeal to bring his constructive discharge complaint before the Merit Systems Protection Board. (App. B at 4a; App. E at 23a).

In April 1992, Hastings "filed a complaint in the United States District Court for the District of Colorado, claiming (among other things) that he was constructively discharged due to

sex and age discrimination." (App. B at 4a-5a). In reaching this issue, the district court refused to dismiss Hastings' constructive discharge claim for being untimely. (App. E at 23a). Nevertheless, the court determined that while Hastings demonstrated "highly undesirable working conditions," there was insufficient evidence that those working conditions were the result of age or sex discrimination. (*Id.* at 25a). This decision was affirmed by the United States Court of Appeals for the Tenth Circuit. (App. D at 15a).

Hastings then brought this case before the MSPB, where the initial decision concluded that the MSPB lacked subject matter jurisdiction only because of Hastings' earlier lawsuit. (App. B at 6a-7a). The full MSPB then affirmed this decision, as did the United States Court of Appeals for the Federal Circuit. (App. A at 1a).

JURISDICTIONAL BASIS OF THE COURT OF APPEALS

Jurisdiction was proper before the United States Court of Appeals for the Federal Circuit pursuant to 5 U.S.C. § 7703 and 28 U.S.C. § 1295(a)(9).

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS' DECISION PRESENTS AN ISSUE OF SUBSTANTIAL FEDERAL IMPORTANCE WHICH HAS NOT, BUT SHOULD BE, DETERMINED BY THIS COURT.

The Merit Systems Protection Board only has that jurisdiction provided by the statutes and regulations pertaining to the MSPB. *Walton v. Dept. of Navy*, 42 M.S.P.R. 244, 248 (1989). Whether the MSPB has such jurisdiction, is a question which is

reviewed *de novo*. *Waldau v. Merit Systems Protection Bd.*, 19 F.3d 1395, 1399 (Fed. Cir. 1994). In this case, the Federal Circuit erroneously upheld a MSPB's decision that subject matter jurisdiction was lacking. Consequently, the Agency was allowed to ignore its responsibility, under the law, to notify an aggrieved employee of his appeal rights before the MSPB.

An employee who has suffered both an adverse action and discrimination has the choice of appealing his claim to either the Equal Employment Opportunity Commission (EEOC) or the MSPB. *See* 5 U.S.C. § 7702; *Connor v. United States Postal Service*, 15 F.3d 1063 (Fed. Cir. 1994); *Dawson v. U.S. Postal Serv.*, 45 M.S.P.R. 194 (1990); 29 C.F.R. § 1613.403. A coerced retirement is appealable to the MSPB. *Schultz v. United States Navy*, 810 F.2d 1133 (Fed. Cir. 1987); *Covington v. Dept. of Health & Human Serv.*, 750 F.2d 937 (Fed. Cir. 1984). Thus, if an employee believes that his retirement is coerced, he has the right to go before either the EEOC or the MSPB.

The Agency has an absolute legal obligation to inform such an employee of his appeal rights to *either* the EEOC or the MSPB. *Dawson v. U.S. Postal Serv.*, 45 M.S.P.R. at 195; 29 C.F.R. § 1613.403; 5 C.F.R. § 1201.21. If an employee is not informed of both of these options then he cannot be said to have elected to pursue his claim in the only forum of which he was notified. *Dawson*, 45 M.S.P.R. at 196. In those situations where the employee was not notified of his option to pursue his remedies with the MSPB, then the MSPB still has jurisdiction over the matter even though the appeal may be filed beyond the normal time period. *Id.* at 197; *see also, Fuentes v. U.S. Postal Serv.*, 54 M.S.P.R. 4, 7 (1992); *Smith v. Dept. of Transp., F.A.A.*, 25 M.S.P.R. 80, 82 (1984).

In the instant case, it is agreed that Hastings was never notified that he had a right to go before the MSPB. (App. B at 4a).

The Administrative Judge condoned this complete failure of the Agency to abide by the law by instead assuming that because Hastings was represented by an attorney, he therefore, automatically knew of his appeal rights. (App. B at 6a). This argument was made without any consideration as to what the purposes were for the retention of counsel. Furthermore, this argument is dangerous because it allows an agency to flout the law. Significantly, the regulations do not provide an exception to the notice requirements where the employee is represented by counsel. Consequently, neither the MSPB, nor the Federal Circuit has the right to add an exception not contained in the regulation itself. *See* Ernest C. Hadley, *A Guide to Federal Sector Equal Employment Law & Practice 1979-1992,* 666 (5th ed. Dewey Pub. 1992). The MSPB gives no basis for its conclusion that the Agency is not required to provide proper notification when the employee is represented by an attorney. A simple reading of the regulations reveals that this conclusion is not supportable.

The Agency claims to have presumed Hastings' retirement to be voluntary. (*Id.*). However, this presumption is belied by the fact that the EEOC later determined that for five years the Agency completely ignored his constructive discharge complaint. (*Id.*). Thus, at that point the Agency could, under no circumstances, be said to still have presumed that Hastings' retirement was voluntary. Nevertheless, the Agency still did not notify Hastings of his appeal rights before the MSPB when it dismissed the complaint in January 1993. (*See id.*). This complete failure to notify Hastings of his appeal rights is a blatant violation of the Agency's obligations under the law. *Dawson v. U.S. Postal Serv.*, 45 M.S.P.R. at 195; 29 C.F.R. § 1613.403; 5 C.F.R. § 1201.21.

Ultimately, the holding that the MSPB lacks subject matter jurisdiction is based upon the case *Connor v. United States Postal Services,* 15 F.3d 1063 (Fed. Cir. 1994). That case involved an employee, Connor, who was removed from his position with the

Postal Service (Agency). *Id.* at 1064. The Agency properly notified Connor of his right to follow *either* the internal appeal procedures of the Agency, or appeal directly to the MSPB. *Id.* Connor chose to follow the internal appeal procedures of the Agency and filed an internal EEO complaint. *Id.* However, he also "amended a complaint which he previously had filed in the United States District Court for the Northern District of Texas, to include a count based on the removal." *Id.* The Agency notified Connor that it would no longer consider his complaint because of the court action, and the EEOC affirmed the Agency's action. *Id.*

Meanwhile, Connor had also appealed his removal to the Board. *Id.* The administrative judge dismissed Connor's appeal for lack of jurisdiction because of the pending civil action. The Board reversed and remanded the case to determine the timeliness of Connor's complaint. *Id.* The administrative judge then concluded that Connor had not timely appealed to the Board and that good cause for waiving a timely appeal had not been shown. *Id.* at 1065. This decision was then appealed to the Federal Circuit which held that the Board lacked jurisdiction because, "Connor cannot simultaneously 'litigat[e] the same case in the United States Courts and in the administrative process.' " *Id. quoting Colon v. Chairman of Bd. of Directors of Fed. Deposit Ins. Corp.*, 723 F. Supp. 842, 844 (D.P.R. 1989).

In the instant case, the administrative judge concluded that while Connor had been properly informed of his forum options the court in *Connor* did not rest its decision on this fact. (App. B at 6a). No thoughtful substantive analysis is provided for this assertion.

Connor is quite distinct from the present case. If a person is properly informed of his appeal rights, there is no rational basis for an argument that he could not have known what those appeal rights were at the time he chose the forum in which to proceed. In

fact, the situation presented in this case was not even considered in *Connor.* Connor knew of his forum options when he elected to proceed both in court and before the MSPB. Here, Hastings was not informed of his election rights and therefore was denied the opportunity to actually make an informed decision with respect to which forum was the most appropriate one for pursuing all of his claims. Since *Connor* did nothing to affect the requirement that an agency provide proper notification to an employee of his appeal rights, that case is inappropriate authority for Hastings' situation.

Finally, *Connor* is inapposite because in that case Connor tried to pursue his discrimination claim based upon removal in two forums simultaneously. *Connor,* 15 F.3d at 1066. In this case, however, Hastings is not pursuing his discrimination claim. Instead, his case involves only the issues concerning the Agency's violation of personnel policies under 5 U.S.C. § 2302(b), which do not involve age or sex discrimination. (App. B at 6a).

There are no concerns regarding *res judicata* since that doctrine applies only in cases with the "same parties or their privies *and* the same cause of action." *McCandless v. Merit Systems Protection Bd.*, 996 F.2d 1193, 1197-98 (Fed. Cir. 1993) (emphasis added). In Hastings' earlier case, before the district court, the constructive discharge claim only encompassed the issue of sex or age discrimination. (App. B at 6a-7a; App. E at 25a). For the same reason, collateral estoppel is not a relevant concern. *Id.* Finally, none of these issues were raised as concerns by the administrative judge in his decision. (*See* App. B).

The MSPB and the court's decision means an unwarranted and impermissible amendment and change to regulations, in excess of their jurisdiction since the explicit language of the regulations mandate actions to be taken by the Agency in which

the Agency failed, refused, or neglected to do, thus depriving Mr. Hastings of rights guaranteed to him by law.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests the Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit in this matter since the court below, as well as the MSPB, exceeded their authority in rewriting the regulations.

Respectfully submitted,

JOHN W. McKENDREE
Counsel of Record
LAW OFFICES OF
JOHN W. McKENDREE
Attorneys for Petitioner
1244 Grant Street
Denver, Colorado 80203
(303) 861-8906

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT FILED JUNE 21, 1995

United States Court of Appeals for the Federal Circuit

95-3045

HARRY D. HASTINGS,

Petitioner,

v.

SMALL BUSINESS ADMINISTRATION,

Respondent.

JUDGMENT

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD

in CASE NO(S). DE0752940263-I-1

This CAUSE having been heard and considered it is

ORDERED and ADJUDGED:

Per Curiam (NIES, LOURIE, and CLEVENGER, *Circuit Judges*):

AFFIRMED. *See* Fed. Cir. R. 36.

Appendix A

ENTERED BY ORDER OF THE COURT

s/ Francis X. Ginhart
Francis X. Ginhart, Clerk

DATED: JUN 21 1995

COSTS: Against, Petitioner.

PRINTING $122.40

TOTAL $122.40

ISSUED AS A MANDATE: August 15, 1995

APPENDIX B — INITIAL DECISION OF THE UNITED STATES OF AMERICA MERITS SYSTEMS PROTECTION BOARD, DENVER FIELD OFFICE DATED MAY 19, 1994

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE

DOCKET NUMBER
DE-0752-94-0263-I-1

DATE: MAY 19 1994

HARRY D. HASTINGS,

Appellant,

v.

SMALL BUSINESS ADMINISTRATION, Agency.

Harry D. Hastings, Newton, Mississippi, pro se.

Christopher Holleman, Esquire, Washington, D.C., for the agency.

BEFORE

James A. Kasic
Administrative Judge

INITIAL DECISION

The appellant has untimely appealed, alleging that he was constructively discharged (*i.e.*, forced to retire) from his GS-12,

Surety Bond Specialist position in December 1986. For the reasons discussed below, I dismiss the appeal for lack of appellate jurisdiction.[1]

ANALYSIS AND FINDINGS

Background

In December 1986, the agency presumed the appellant's retirement to be a voluntary action and, thus, did not advise him of his potential appeal right to the Board. Further, the agency does not claim to have advised the appellant of a potential appeal right to the Board at any time subsequent to his retirement and before the filing of this appeal. *See* Official File, Volume 1, Tab 7.

At the time of his retirement, the appellant had several formal discrimination complaints pending with the agency. In 1991, the agency denied these complaints based on the recommendations of an Equal Employment Opportunity Commission (EEOC) administrative judge. The appellant then appealed the agency's decision to the EEOC, which affirmed the agency's decision in most respects, but remanded the issue of the appellants alleged constructive discharge to the agency. The agency ultimately dismissed the constructive discharge complaint as untimely in January 1993.

Prior to that dismissal, however, in April 1992 the appellant filed a complaint in the United States District Court for the District of Colorado, claiming (among other things) that he was

---

1. In light of this jurisdictional finding, I need not address the issue of whether the appellant has shown good cause to excuse the untimely filing of this appeal by over eight years.

constructively discharged due to age and sex discrimination. In that proceeding, the district court granted the agency's motion for summary judgment and dismissed the case because, although the appellant had "describe[d] in detail what appear[ed] to be highly undesirable working conditions," he had not "suggest[ed] facts tying those working conditions to his age or sex." *Hastings v. Saiki*, Order Regarding Dispositive Motions in Civil Action No. 92-F-713, slip op. at 8 (D.Colo. March 11, 1993), at Official File, Volume 2, Tab 8-7.

The appellant then appealed the district court's dismissal to the United States Court of Appeals for the 10th Circuit. This appeal then followed the 10th Circuit's February 14, 1994 decision affirming the district court's dismissal. See Official File, Volume 2, Tab 8-11.

Jurisdiction

The jurisdictional issue presented in this case is whether the appellant's action of having taken his constructive discharge allegation to district court precludes the Board from exercising subject matter jurisdiction over his current appeal. I find that issue is controlled by the United States Court of Appeals for the Federal Circuit's recent decision in *Connor v. United States Postal Service*, 15 F.3d 1063 (Fed. Cir. 1994).

In *Connor*, the Federal Circuit held that where an appellant is challenging an alleged adverse action and alleging prohibited discrimination, his/her statutory options include filing an appeal with the Board or filing a civil action in United States district court. Importantly, however, the Federal Circuit found that once an appellant elects to pursue the district court option, the Board lacks jurisdiction to entertain a subsequently filed appeal. *Connor*, 15 F.3d at 1065-66.

Appendix B

The appellant claims that his case is unlike the situation in *Connor* in two respects. First, unlike the situation in *Connor,* he notes that he was never advised of his right to file an appeal with the Board by his former employing agency. Thus, he claims his choice to pursue the civil action in district court was not a decision made with full knowledge of his litigative options. I find, however, that while the Federal Circuit noted that Mr. Connor had been advised of his right to appeal his removal to the Board in recounting the procedural history of the case, it did not rest its jurisdictional finding on the fact that Mr. Connor knew of his Board option when he amended his district court action to include a challenge to his appeal. *See Connor,* 15 F.3d at 1064-66. Further, in the instant case during the district court litigation, the appellant was represented by a court appointed counsel, who presumably knew of (and advised the appellant of) his choice-of-forum options. *See* Agency Exhibit 5, at Official File, Volume 2, Tab 8-5. Thus, I find that this alleged lack-of-knowledge distinction does not materially distinguish the instant case from the situation in *Connor.*

Secondly, the appellant claims that his case is unlike the situation in *Connor* because the district court decision in his case did not resolve all of the issues that he could raise if the instant appeal was within the Board's jurisdiction. Specifically, he notes that the district court dismissed his case solely because he did not tie the allegedly intolerable working conditions to his claims of age and sex discrimination. Thus, he asserts that if the instant appeal were allowed he could show that his retirement was involuntary due to intolerable working conditions, regardless of whether those intolerable conditions also evidenced impermissible age and sex discrimination.

I acknowledge that the potential scope of inquiry before the

Appendix B

Board in the instant case is broader than the limited discrimination issue which the district court found was dispositive.[2] I find, however, that the potentially broader scope is irrelevant to the jurisdictional question. Again, as with the knowing-election issue, the Federal Circuit's jurisdictional finding in *Connor* is not premised on the likely identity of issues in the cases. Rather, the Federal Circuit ruled simply that the filing of a civil suit in district court challenging an action divests the Board of jurisdiction over a subsequently filed appeal challenging the same action.

In sum, I find that the appellant has failed to meet his burden of showing that his appeal is within the Board's appellate jurisdiction. *See* 5 C.F.R. § 1201.56(a)(2)(i) (1994). Further, I deny his request for a hearing because he has not raised factual disputes related to the jurisdictional issue which require the taking of testimony to resolve. *See Manning v. Merit Systems Protection Board*, 742 F.2d 1424, 1427-28 (Fed. Cir. 1984).

DECISION

The appeal is DISMISSED.

FOR THE BOARD: s/ James A. Kasic
James A. Kasic
Administrative Judge

---

2. Indeed, I would look first to whether the working conditions (whether discriminatory or not) were so difficult that a reasonable person would have felt compelled to retire. *See Swift v. United States Postal Service*, DA-0353-93-462-I-1, slip op. at 4-5 (February 17, 1994). Further, for purposes of determining whether the retirement was involuntary, I would consider allegations of alleged discrimination for the limited purpose of determining whether they support a finding of coercion or intolerable working conditions. *See Burke v. Department of the Treasury*, 53 M.S.P.R. 434, 438-39 (1992).

Appendix B

NOTICE TO APPELLANT

This initial decision will become final on June 22 1994, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Room 806
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

Appendix B

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be *received* by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

APPENDIX C — ORDER OF THE UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD, DENVER FIELD OFFICE DATED APRIL 1, 1994

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE

DOCKET NUMBER DE-0752-94-0263-I-1

DATE: April 1, 1994

HARRY D. HASTINGS,

Appellant,

v.

SMALL BUSINESS ADMINISTRATION, Agency.

ORDER

By telephone on March 31, 1994, I spoke with the parties. We discussed the jurisdictional and timeliness issues involved in this case. The jurisdictional issue arises because the appellant admits that a Federal District Court has already entertained the merits of his constructive discharge claim (*i.e.*, involuntary retirement claim) and issued a decision dismissing it. Thus, his current appeal appears to be outside the Board's subject matter jurisdiction. *See Connor v. United States Postal Service*, No. 93-3082 (Fed. Cir. February 4, 1994) (attached).

The timeliness issue arises because the appellant's alleged involuntary retirement occurred in late December 1986 and the agency dismissed his EEO complaint challenging the alleged

involuntary retirement when he elected to pursue the Federal District Court case. *See* 5 C.F.R. § 1201.22(b) (1993) (an appeal is to be filed within 20 days of the date of the action involved); 5 C.F.R. § 1201.154(b) (where an appellant elects to challenge an action through the discrimination complaints process, he may file an appeal with the Board: 1) within 20 days after the final agency decision on his complaint or 2) at any time following the passage of 120 days if the agency has failed to issue a final decision on the complaint); and 5 C.F.R. § 1201.12 (an administrative judge may waive Board regulations, like the timeliness regulations, for good cause shown).

On both the timeliness and jurisdictional issues the appellant bears the burden of proof by a preponderance of the evidence. 5 C.F.R. § 1201.56(a)(2). Accordingly, because the appellant indicated that he had already addressed the jurisdictional issue in a recently filed (but not yet received) submission, I set April 22, 1994 as the date for the agency responses on the jurisdictional issue. Further, by April 22 the appellant must file a sworn statement explaining when and how he first learned of a possible appeal right to the Board and why he believes that he acted diligently in pursuing that appeal right. Then the appellant will have until May 6, 1994, to respond to the agency response on the jurisdictional issue. Similarly, the agency will have until May 6 to respond to the appellant's submission on the timeliness issue. On May 6, the record on each issue will close and I will not accept submissions addressing them unless the submissions are shown to contain new and material evidence which was previously unavailable despite diligent efforts to obtain it. If I find that the appellant has established that his appeal is within the Board's subject matter jurisdiction and that good cause exists to waive the untimely filing, I will set further steps toward adjudication of the appeal. If not, I will dismiss the appeal, affording the appellant the appropriate appeal rights.

Appendix C

If either party believes that this summary is inaccurate or incomplete, that party should file a written objection by April 22, 1994.

FOR THE BOARD

s/ James A. Kasic
James A. Kasic
Administrative Judge

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail, unless otherwise indicated below, this day to each of the following:

Appellant

Harry D. Hastings
Route 3, Box 437
Newton, MS 39345

Agency's Representative(s)

Christopher Holleman
Office of General Counsel
Small Business Administration
Mail Code 2220
409 Third Street, S.W.
Washington, DC 20416

April 1, 1994
(Date)

s/ Nicole R. Hasty
Nicole R. Hasty
Legal Assistant

APPENDIX D — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED FEBRUARY 14, 1994

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 93-1125
(D.C. No. 92-F-713)
(D. Colo.)

HARRY D. HASTINGS,

Plaintiff-Appellant,

v.

PATRICIA SAIKI, administrator, SMALL BUSINESS ADMINISTRATION; RUSSELL BERRY,

Defendants-Appellees.

ORDER AND JUDGMENT*

Before TACHA and BRORBY, Circuit Judges, and BROWN,** Senior District Judge.

** Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

Appendix D

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. Accordingly, appellants request for oral argument is denied and the case is ordered submitted on the briefs.

Plaintiff appeals from the district court's grant of summary judgment in favor of defendants, his employer and superior, in this employment discrimination suit. Plaintiff alleged defendants discriminated against him in various respects, ultimately leading to his constructive discharge through early retirement, on account of his age, sex, and participation in protected activities under Title VII and the Age Discrimination in Employment Act. The district court held that plaintiff had failed to establish a prima facie case of discrimination or retaliation and that, moreover, defendants had presented and substantiated legitimate, nondiscriminatory reasons for their actions which had not been effectively rebutted as pretextual by plaintiff.

> We review summary judgment de novo and apply the same legal standard used by the district court under Fed. R. Civ. P. 56(c). Summary judgment is appropriate if there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law. We view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence; which would require submission of the case to a jury.

Appendix D

Green Constr. Co. v. Kansas Power Light Co., 1 F.3d 1005, 1008 (10th Cir. 1993) (citations and internal quotations omitted). Summary judgment will not be forestalled by conclusory allegations, *McVay v. Western Plains Serv. Corp.*, 823 F.2d 1395, 1398 (10th Cir. 1987), or by merely colorable evidence, *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 249-50 (1986).

Upon review of the arguments raised and materials submitted by the parties, we concur in the district court's assessment of the critical deficiencies in plaintiff's case. In our view, nothing brought to our attention on this appeal undercuts that assessment. Furthermore, given the trial *de novo* to which plaintiff was entitled in the district court, *see Chandler v. Roudebush*, 425 U.S. 840, 844-45 (1976), plaintiff's charge of bias in connection with his administrative proceedings has no relevance here. *Cf. Cottrell v. Newspaper Agency Corp.*, 590 F.2d 836, 838 (10th Cir. 1979) (noting in related context that "Title VII suits are *de novo* actions, so adverse interim [adminstrative] findings are no hindrance to a claim in federal district court"). Accordingly, we hold that summary judgment was properly entered in favor of defendants for substantially the reasons stated by the district court.

The judgment of the United States District Court for the District of Colorado is AFFIRMED.

Entered for the Court

Wade Brorby
Circuit Judge

APPENDIX E — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO FILED MARCH 11, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92-F-713

HARRY D. HASTINGS,

Plaintiff,

v.

PATRICIA SAIKI, Administrator, Small Business Administration, and RUSSELL BERRY,

Defendants.

ORDER REGARDING DISPOSITIVE MOTIONS

Sherman G. Finesilver, Chief Judge

This is a case involving allegations of gender and age discrimination. This matter comes before the Court on Defendants' motions for summary judgment and dismissal. Jurisdiction is based on 28 U.S.C.A. § 1331. The litigants have fully briefed the matter. For the reasons stated below, the motion is GRANTED.

I.

Plaintiff, Harry Hastings, began work with Defendant Small Business Administration ("SBA") on or about August 1976 in the Denver Regional Office.[1] From August 1980 until his retirement

1. All factual recitations in this Order have been alleged in the litigants' pleadings.

from the federal government in December 1986, Hastings was employed by the SBA as a Surety Bond Officer in the Surety Bond Division of the Regional Office. Hastings' responsibilities in the surety bond program included reviewing surety bond applications and making recommendations either to accept or reject the applications. The applications and Hastings' recommendations were then reviewed by Hastings' superiors who would then make their own recommendations for accepting or rejecting the applications.

The performance of SBA employees was evaluated on the Performance Management Appraisal System ("PMAS"). PMAS ratings were used in decisions on bonuses, promotions, and merit raises. The supervisor of each SBA employee bore responsibility for preparing the employee's PMAS rating. The PMAS system required employees to receive notification of their ratings on "critical elements" and "performance standards" at the beginning of each rating year.[2] Part of Hastings' complaint revolves around the tardiness with which he received his PMAS notifications. Further, when Hastings was notified of the proposed critical elements, he disagreed with all three. He also disagreed with his subsequent rating, claiming the computer data contained inaccuracies and his supervisors had also used incorrect figures. He believed these errors affected his performance ratings, including the calculation of his turnaround time in processing applications.

Until February 1983, Hastings' immediate, first line

---

2. Critical elements were those areas of an employee's performance which were to be objectively measured and considered in the employee's PMAS rating. Performance standards were the criteria established to determine ratings for each critical element. The critical elements and performance standards of Hastings related primarily to the volume and speed of surety bond applications processing.

supervisor was Senior Surety Bond Officer Helen Edwards.[3] Edwards was transferred to the Denver District Office after filing numerous complaints for sex and age discrimination against the SBA and several individuals, including Hastings. On or about April 1984, Defendant Russell Berry was transferred from the Central Office in Washington, D.C. to the Denver Regional Office where he became Hastings' first line supervisor.

In February 1985, Edwards prevailed on portions of her sex discrimination case, and in May of that year she was transferred back to the Denver Regional Office's Surety Bond Division. Edwards once again became Hastings' first line supervisor and Berry was moved to Hastings' second line supervisor and Edwards' immediate supervisor. Hastings claims after Edwards' return to the bond surety program, she began subjecting him to various forms of hostile treatment, including delays in reviewing his work that caused his performance evaluations to suffer and public abuse of Hastings in the presence of his coworkers.

In December 1986, Hastings made two requests to enter a trial retirement program he believed to have resumed after a brief suspension. His requests were denied based on a memorandum of understanding between the SBA and the American Federation of Government Employees union stating that trial retirement was still being held in abeyance. Hastings applied for reconsideration but before the SBA responded, he retired effective December 31, 1986, citing intolerable working conditions. He filed formal administrative Equal Employment Opportunity ("EEO") complaints on May 20, 1986; July 21, 1986; July 28, 1986; and October 8, 1986. The complaints raised a number of issues

---

3. Edwards was originally named as a defendant in this case but was dismissed following her death in May 1992.

revolving around sex and age discrimination, most implicating Edwards. He filed two more complaints in December 1986 and January 1987 but neither was accepted.

In July 1987 Hastings was notified that certain issues he had raised in the complaints would be dismissed as untimely filed. The dismissal was later upheld by the Equal Employment Opportunity Commission ("EEOC"). The SBA also consolidated the four administrative EEO complaints which it had accepted and notified Hastings that it would investigate the alleged denial of overtime, interference with his job performance, emotional outbursts by Edwards, the unacceptable PMAS critical elements, his low PMAS rating, and Berry's refusal to allow him to attend the surety bond conference.

On August 23, 1991, the SBA mooted some issues and adopted the recommendation of an administrative judge to dismiss the remainder. Following Hastings' appeal, the EEOC ruled the SBA had ignored Hastings' alleged constructive discharge issue and remanded it to the SBA for EEO counseling. The EEOC subsequently affirmed the SBA's decision to dismiss all other issues.

Hastings filed this action in federal court on April 15, 1992. He claimed he had been discriminated against in his eligibility for overtime work, the administration of his PMAS, and his working conditions, working environment, and general terms and conditions of his employment. Hastings also alleged constructive discharge as well as reprisal in Defendants' retaliation for his filing of discrimination complaints. Defendants moved for summary judgment on January 21, 1993, claiming Hastings had failed to establish a prima facie case of sex or age discrimination.

Appendix E

II. Summary Judgment Standard

Granting summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Ash Creek Mining Co. v. Lujan*, 934 F.2d 240, 242 (10th Cir. 1991); *Metz v. United States*, 933 F.2d 802, 804 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 416 (1991); *Continental Casualty Co. v. P.D.C., Inc.*, 931 F.2d 1429, 1430 (10th Cir. 1991). A genuine issue of material fact exists only where "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Merrick v. Northern Natural Gas Co.*, 911 F.2d 426, 429 (10th Cir. 1990). Only disputes over facts that might affect the outcome of the case will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Allen v. Dayco Prods., Inc.*, 758 F. Supp. 630, 631 (D. Colo. 1990).

In reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the party opposing the motion. *Newport Steel Corp. v. Thompson*, 757 F. Supp. 1152, 1155 (D. Colo. 1990). All doubts must be resolved in favor of the existence of triable issues of fact. *Boren v. Southwestern Bell Tel. Co.*, 933 F.2d 891, 892 (10th Cir. 1991); *Mountain Fuel Supply v. Reliance Ins. Co.*, 933 F.2d 882, 889 (10th Cir. 1991).

In a motion for summary judgment, the moving party's initial burden is slight. In *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), the Supreme Court held that the language of rule 56(c) does not require the moving party to show an absence of issues of material fact in order to be awarded summary judgment. Rule 56 does not require the movant to negate the opponent's

claim. *Id.* at 323. The moving party must allege an absence of evidence to support the opposing party's case and identify supporting portions of the record. *Id.*

Once the movant has made an initial showing, the burden of going forward shifts to the opposing party. The nonmovant must establish that there are issues of material fact to be determined. *Id.* at 322-23. The nonmovant must go beyond the pleadings and designate specific facts showing genuine issues for trial on every element challenged by the motion. *Tillett v. Lujan,* 931 F.2d 636, 639 (10th Cir. 1991). Conclusory allegations will not establish issues of fact sufficient to defeat summary judgment. *McVay v. Western Plains Serv. Corp.,* 823 F.2d 1395, 1398 (10th Cir. 1987).

In reviewing the evidence submitted, the court should grant summary judgment only when there is clearly no issue of material fact remaining. In *Anderson,* 477 U.S. at 249-50, the court held that summary judgment should be granted if the pretrial evidence is merely colorable or is not significantly probative. In *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986), the Court held that summary judgment is appropriate when the trial judge can conclude that no reasonable trier of fact could find for the nonmovant on the basis of evidence presented in the motion and the response. *Id.* at 587.

III.

In order to prevail in an individual disparate treatment case, a plaintiff must generally satisfy a three-pronged test adopted by the Tenth Circuit in *McAlester v. United Air Lines, Inc.,* 851 F.2d 1249, 1260 (10th Cir. 1988) (citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973)). First, the plaintiff must prove by a preponderance of the evidence a prima facia case of

discrimination. Second, once the plaintiff establishes her prima facie case, the burden of production shifts to the defendant to articulate some legitimate, nondiscriminatory reason for its action. Finally, if the defendant is able to advance such a reason, the plaintiff has the burden of proving the defendant's reason is merely a pretext for discrimination. The plaintiff has the ultimate burden of proving a defendant treated him less favorably than others because of his age or sex. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981).

A. Prima Facie Discrimination

To prevail upon a claim of disparate treatment based on age or sex, a plaintiff must establish a prima facie case of discrimination by showing (1) the plaintiff was a member of the protected class[4]; (2) the plaintiff was adversely affected by a personnel action; (3) the plaintiff's performance was satisfactory; and (4) persons outside the protected class were not adversely affected by the personnel action. *Id.* at 253-54; *McDonnell Douglas,* at 1824. The plaintiff must produce either direct or circumstantial evidence from which a factfinder could reasonably conclude that the employer intended to discriminate in reaching the employment decision. *Branson v. Price River Coal Co.,* 853 F.2d 768, 771 (10th Cir. 1988). Although the prima facie standard originated in the context of Title VII, it has also been adopted for cases brought under the Age Discrimination in Employment Act ("ADEA"). *Oscar Meyer & Co. v. Evans,* 441 U.S. 750, 756 (1979). In alleging age discrimination, a plaintiff must also show that his age was a determining factor in the

---

4. For Hastings' claims of sex and age discrimination he must show, respectively, that at the time of the incidents he was a male and he was over the age of 40. Defendants concede Hastings satisfies both requirements.

employer's decision. *Merrick v. Northern Natural Gas Co.*, 911 F.2d 426, 429 (10th Cir. 1990).

Beginning with the third criterion, we note that Hastings' performance appears to have been more than satisfactory. Defendants point out that he generally received performance evaluations ranging from above average to the highest possible score. Hastings has satisfied the third criterion. We will address the remaining criteria in the context Hastings' specific claims.

1. Constructive Discharge and Reprisal

Hastings claims he was "forced into a 'trial retirement' in order to escape the discrimination and harrassment" of Defendants. Defendants state the Court lacks jurisdiction over Hastings' claim of constructive discharge because Hastings failed to exhaust his administrative remedies. Hastings claims that in his fifth EEO complaint, filed in December 1986 and apparently "not accepted," he alleged constructive discharge. He notes that on December 26, 1991, the EEOC ruled he had raised the constructive discharge issue but that the SBA had ignored it. The EEOC remanded the issue to the agency. Nevertheless, after the remand, the SBA stated the issue was untimely. It appears as if Hastings has a colorable claim he exhausted his administrative remedies. We will not dispose of the constructive discharge claim as untimely.[5]

---

5. To the extent the constructive discharge is alleged to be the result of Defendants' retaliation, we also note that "[w]hen the complaint filed in the district court alleges that the employer has retaliated against the employee for filing a discrimination claim with the EEOC, courts have uniformly held that the employee need not exhaust administrative remedies on the retaliation claim." *Haynes v. Mark*, 520 F. Supp. 1183, 1184 (D. Colo. 1981).

Appendix E

In order to show constructive discharge in a discrimination context, a plaintiff must show the employer " 'by its illegal discriminatory acts had made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign.' " *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 467 (10th Cir. 1990) *quoting Derr v. Gulf Oil Corp.*, 796 F.2d 1150, 1154 (10th Cir. 1986). The key phrase here is "by its discriminatory acts." We do not believe Hastings has met his burden of showing that any actions by Defendants were discriminatory.

Federal antidiscrimination laws do not require that employers treat all employees equally, *McDonnell*, 411 U.S. at 800-01; *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971); *Clark v. Atchison, Topeka and Santa Fe Ry. Co.*, 731 F.2d 698, 702 (10th Cir. 1984), or even fairly, *Archuleta v. Colorado Dept. of Institutions*, 936 F.2d 483, 487 (10th Cir. 1991). The laws exist, rather, to prevent employers from discriminating on the basis of race and gender, *id*, as well as age. To establish a prima facie case of illicit discrimination, a plaintiff must produce evidence of discriminatory intent or motive on the part of the defendant. *Patterson*, 491 U.S. at 186-88; *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 335-36 n. 15 (1977); *Clark*, 731 F.2d at 702. While a plaintiff need not show that a defendant was personally prejudiced against the plaintiff, some evidence of individualized disparate treatment or statistical disparity is necessary. *McAlester*, 851 F.2d at 1260.

Hastings relies on statements he made in his deposition and affidavits in concluding that "the emotional outbursts of his supervisor, the failure of the agency to address issues of concern to Hastings, the failure of the agency to provide appropriate evaluations of his performance and other forms of disparate

treatment to which Plaintiff Hastings was subjected did in fact make his working conditions intolerable." Hasting does indeed describe in detail what appear to be highly undesirable working conditions. Nowhere, however, does Hastings suggest any facts tying those working conditions to *his age or sex.* Hastings does not dispute Defendants' assertion that his supervisor, Edwards, had personality conflicts with most or all of the people with whom she worked. It also appears that she had running battles with Hastings; Berry stated in his deposition that both Edwards and Hastings continually went to him to complain about each other, prompting Berry to investigate and mediate their disputes. Berry Depo. at 57-8, 84-5, 99-103, 112.

Hastings does not adduce any reason for a finder of fact to infer that Defendants possessed not merely intent to make his work miserable, but *discriminatory* intent or motive. The former is an unfortunate occurrence in the workplace; only the latter provides a cause of action under Title VII and the ADEA. Hastings asserts "Defendants have given no legitimate nondiscriminatory reason for the intolerable state of Plaintiff Hastings' work life," but Hastings fails to suggest, as he must, a prima facie discriminatory reason in the first place.

For example, in *McAlester,* the plaintiff was able to point to specific examples in the workplace where white employees who violated similar rules were merely suspended, while minority employees were terminated. 851 F.2d at 1260. In *Chaney v. Southern Ry. Co*, 847 F.2d 718, 722 (11th Cir. 1988), a black plaintiff discharged as a result of his positive drug test met his prima facie burden by showing the defendant had discovered white employees possessing or using marijuana without also discharging them. On the other hand, a plaintiff's conclusory allegations of discrimination may be insufficient to raise an issue

of fact on summary judgment. *See, e.g., Smith v. American Express Co.*, 853 F.2d 151 (2nd Cir. 1988) (plaintiff's unsupported and ultimately rebutted allegation that an inferior candidate was promoted in his place failed to show that employer's stated reasons were mere pretext); *Meiri v. Dacon*, 759 F.2d 989 (2nd Cir.), *cert. denied*, 474 U.S. 829 (1985) (summary judgment appropriate where plaintiff merely alleged subjective bias on part of supervisor and could not describe with specificity any of the alleged disparaging remarks about Jews).

Hastings' constructive discharge claim must therefore be dismissed.

Hastings also claims that he was subject to reprisal for filing his various discrimination complaints. To establish a prima facie case of unlawful reprisal, he must show:

> (1) protected opposition to discrimination or participation in a proceeding arising out of discrimination; (2) adverse action by the employer contemporaneously or subsequent to the employee's protected activity; and (3) a causal connection between such activity and the employer's action.

Williams v. Rice, 1993 WL 447 (10th Cir. 1993); *Allen v. Denver Public School Board*, 928 F.2d 978 (10th Cir. 1991).

Defendants concede Hastings satisfied the first element of opposition to discrimination by filing his complaints. However, he has alleged no adverse action[6] taken, after May 1986, as a

---

6. Indeed, some of the actions alleged by Hastings to have been adverse — regarding bonuses, for example — were not contained in the complaint and,

(Cont'd)

result of his complaints and his claim of reprisal must therefore be dismissed.

2. PMAS Performance Evaluations of 1985 and 1986

Hastings asserts that his PMAS notification was tardy and that the completed evaluations were plagued with errors which were not later corrected by the SBA. However, Hastings does not dispute that all employees received their PMAS notifications late. He has therefore made out no claim of disparate treatment in the first instance. Hastings next claims that his low evaluation and the gross inaccuracies in the calculation of his turnaround time were discriminatory acts by the SBA Hastings admitted in his deposition that it was possible the errors were beneficial to him; further, he did not know if other employees had been somehow exempted from the errors. Hastings Depo. at 145-46. Hastings also does not deny that he received a positive rating,[7] though he notes that women in the department had their ratings adjusted upward by Berry while his own were not adjusted even after he notified his superiors of the errors. We note that the women's ratings adjustment, however, was done only with regard to a clerical processing critical element that was not part of Hastings' evaluation. No ratings common to both Hastings and other employees were adjusted.

(Cont'd)

furthermore, occurred in 1984, *before* Hastings filed any of his EEO discrimination complaints. The complaint's only allegations of actions taken by Defendants after May 1986 were Hastings' July 14, 1986 meeting with Edwards and Hastings' September 5, 1986 evaluation, in which he received his usual above-average ratings. Neither of these actions were alleged to have been adverse and, in any event, Defendants has given adequate nondiscriminatory reasons for both of them.

7. Hastings received the highest possible rating on one critical element and the second-highest on the other.

Appendix E

However, even if Hastings were able to make out a prima facie case on these facts, it is undisputed that no women's ratings were adjusted due to the *errors*; rather, all employees were stuck with their errors. The two women who received adjustments did so because of a large influx of work outside their control. Berry Depo., Dec. 29,1992, at 180. The SBA has thus borne its burden of giving a nonpretextual reason for any disparate treatment. In addition, the employees whose ratings were adjusted were not similarly situated to Hastings. Finally, we note that even if Hastings had received undeserved ratings, he has not shown any adverse effect from them.

3. The 1986 Surety Bond Conference

Hastings brought up for the first time in his deposition, rather than his complaint, the issue of being excluded from a surety bond conference in 1986, despite his attendance in previous years. Edwards and Berry were chosen to attend the conference, as was Jerry Carroll, who Hastings alleges had only minimal connection to the conference. The object of Hastings' grievance over his exclusion from the surety bond conference is unclear. In his deposition, he claims Berry should not have gone in his place, while in his response brief he states Berry's attendance was justifiable but Edwards should not have gone. In any event, the Court can hardly consider as evidence of discrimination the fact that Edwards, a woman, went and Hastings, a man, did not; even so, the SBA has explained that it sent Edwards and Berry based on the future responsibilities they would have for developing and implementing a computer program for use in the Denver Regional Office. Carroll's travel funds did not come from the Surety Bond Division budget because he was not in the division. Finally, it is clear that all three conference participants were Hastings' superiors. Hastings was therefore not similarly situated

to those who went and the SBA has given a legitimate nondiscriminatory reason for not sending him.

4. Trial Retirement, Overtime, Performance Awards, and General Working Conditions

Hastings' other claims of discrimination suffer from the same lack of connection shown between his age and gender and his treatment as do his other claims. First, even if Hastings' interpretation of the enforceability of the trial retirement program had been correct, he has alleged nothing more than the fact he was denied trial retirement. He does not connect this denial with his age or sex. Hastings also admits he was the first employee to apply for trial retirement and cannot show that such retirement was granted to anyone, much less someone outside the protected class, after his departure.

Second, in the context of his overtime claim, Hastings is unable even to show that he was treated differently from similarly situated employees. He does not dispute that the policy on overtime was generally to have clerical workers do clerical work all supervised by a supervisor. The fact that Hastings filled in for Edwards in performing overtime work on occasion does not change the fact that he was the only non-clerical, non-supervisory employee in the Surety Bond Division. It is simply not relevant to the question of whether Hastings suffered a uniquely disparate treatment that other employees in the division, not similarly situated, worked overtime, or that employees in other divisions worked overtime.

Third, Hastings also claims that Berry's failure to recommend him for performance awards despite his high performance ratings is indicative of discrimination. Aside from a

vague allegation that a person outside the protected class received the performance award, Hastings offers no facts supporting any inference of discrimination.

Finally, Hastings states he was subject to Edwards' false accusations of incompetence, her emotional outbursts, her threats to lower his ratings, and the SBA's refusal to take action on these matters. Hastings allows that Edwards "did mistreat other surety bond employees, but not to the same degree that she mistreated Plaintiff Hastings." We again note that mistreatment alone does not make out a case for gender or age discrimination.

In all of Hastings' claims, he appears to maintain that solely because his supervisor was female, he was over forty, and he was mistreated, he was somehow discriminated against on the basis of sex and age. The only proof Hastings offers of the SBA's discriminatory intent in sex discrimination is that he was male and his supervisor was female; likewise, the only evidence he provides for his claim that the SBA discriminated against him on the basis of age is the fact that his supervisor was *older* than he. Hastings Depo., Dec 11, 1992, at 105. Nowhere does Hastings even mention the younger workers' ages, nor does he show that he was treated differently from them. Nowhere is gender or age alleged in a nonconclusory way to have been the basis for employment decisions. Without some showing of either discriminatory impact or intent, Hastings is unable to distinguish himself from any other employee who comes away from a job dissatisfied with his treatment. Hastings has failed to "go beyond the pleadings and . . . designate 'specific facts showing that there is a genuine issue for trial' " on every element challenged by Defendants' motion. *See Celotex Corporation*, 477 U.S. at 324. Hastings has not satisfied his prima facie burden.

Appendix E

B. Legitimate, Nondiscriminatory Reason versus Pretext

We further find upon our review of the pleadings that to the extent Hastings could have made out a prima facie case, Defendants have more than adequately provided nondiscriminatory reasons for all of their actions.

IV.

Accordingly, it is ordered that:

(1) Defendants' Motion for Summary Judgment, filed January 21, 1993, is GRANTED.

(2) The Clerk of the Court is DIRECTED to enter judgment in favor of Defendants and against Plaintiff.

(3) Defendants' Motion to Dismiss Defendant Berry, filed January 21, 1993, is MOOT.

(4) Plaintiff's Motion to Strike Defendants' Reply Brief of March 2, 1993, or, in the Alternative, Certain Attachments Thereto, filed March 3, 1993, is GRANTED IN PART. Attachments R-6, R-7, R-8, and R-9 shall be STRICKEN from the Reply Brief of March 2,1993.

(5) All parties to bear their own costs.

Dated this 11th day of March 1993, at Denver, Colorado.

BY THE COURT:

s/ Sherman G. Finesilver
Sherman G. Finesilver, Chief Judge
United States District Court

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92-F-713

HARRY D. HASTINGS,

Plaintiff,

v.

PATRICIA SAIKI, Administrator, Small Business Administration, and RUSSELL BERRY,

Defendants.

JUDGMENT

PURSUANT TO and in accordance with the Order Regarding Dispositive Motions filed March 11, 1993, by the Honorable Sherman G. Finesilver, Chief Judge, it is

ORDERED that judgment is entered in favor of the defendants, Patricia Saiki, Administration, Small Business Administration, and Russell Berry, and against the plaintiff, Harry D. Hastings, and the cause of action and complaint are dismissed with prejudice. It is

FURTHER ORDERED that the parties shall bear their own costs.

DATED at Denver, Colorado, this 11th day of March, 1993.

FOR THE COURT:

JAMES R. MANSPEAKER, CLERK

By: s/ Stephen P. Ehrlich
Chief Deputy Clerk

APPENDIX F — ORDER OF THE UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD DATED SEPTEMBER 15, 1994

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBER
DE-0752-94-0263-I-1

DATE; SEP 15 1994

HARRY D. HASTINGS,

Appellant,

v.

SMALL BUSINESS ADMINISTRATION,

Agency.

Harry D. Hastings, Newton, Mississippi, pro se.

Christopher Holleman, Esquire, Washington, D.C., for the agency.

BEFORE

Ben. L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

Appendix F

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on May 19, 1994, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

s/ Robert E. Taylor
Robert E. Taylor
Clerk of the Board

Washington, D.C.

Appendix F

CERTIFICATE OF SERVICE

I certify that this ORDER was sent today:

By certified mail to:

Harry D. Hastings
Route 3, Box 437
Newton, MS 39345

By regular mail to:

Christopher Holleman
Office of General Counsel
Small Business Administration
Mail Code 2220
409 Third Street, S.W.
Washington, DC 20416

Marjorie Marks
U.S. Office of Personnel Management
Employee Relations Division
1900 "E" Street, N.W., Room 7412
Washington, DC 20415

Merit Systems Protection Board
Denver Field Office
730 Simms Street
P.O. Box 25025
Denver, CO 80225-0025

Appendix F

By hand to:

Office of the Special Counsel
1730 M Street, N.W.
Suite 300
Washington, DC 20036-4505

September 15, 1994
(Date)

Washington, DC

s/ Alice Weingardner
for Robert E. Taylor
Clerk of the Board

APPENDIX G — PETITION FOR REVIEW FILED OCTOBER 19, 1994

United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

PETITION FOR REVIEW

I petition for review to the United States Court of Appeals for the Federal Circuit.

I provide the following information:[1]

MSPB Docket Number: *DE-0752-94-0263-I-1*

Date of Final Order: *SEP 15, 1994*

Date of Initial Decision: *May 19, 1994*

Employing Agency: *Small Business Administration*

Other Party before MSPB (check one): ✔ Employing Agency
__ Office of Personnel Management

Was there an intervenor before the MSPB? If so, who: *No*

Date of receiving notice of Final Order: *SEP 22, 1994*

---

1. Attach copies of the final order of the Merit Systems Protection Board and of the initial decision of the administrative judge of the Merit Systems Protection Board. Do not send any documentary evidence about your case now, but wait until the petition for review is docketed and you are directed to file a brief and appendix.

Appendix G

I now date and sign this petition for review.

OCT 17, 1994 (Date)

s/ Harry D. Hastings (Signature)

Print or type the following information:

Name *Harry D. Hastings*

Address *Rt 3, Box 437*
Newton, MS 39345

Telephone *601-683-3945*

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this Petition for Review to Christopher Holleman

APPENDIX H — RELEVANT STATUTE

§ 7702. Action involving discrimination

(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who —

(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination prohibited by —

(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16)

(ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d))

(iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),

(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or

(v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph,

the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section.

(2) In any matter before an agency which involves —

(A) any action described in paragraph (1)(A) of this subsection; and

(B) any issue of discrimination prohibited under any provision of law described in paragraph (1)(B) of this subsection;

the agency shall resolve such matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board under paragraph (1) of this subsection.

(3) Any decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of —

(A) the date of issuance of the decision if the employee or applicant does not file a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, or

(B) the date the Commission determines not to consider the decision under subsection (b)(2) of this section.

(b)(l) An employee or applicant may, within 30 days after

notice of the decision of the Board under subsection (a)(1) of this section petition the Commission to consider the decision.

(2) The Commission shall, within 30 days after the date of the petition, determine whether to consider the decision. A determination of the Commission not to consider the decision may not be used as evidence with respect to any issue of discrimination in any judicial proceeding concerning that issue.

(3) If the Commission makes a determination to consider the decision, the Commission shall, within 60 days after the date of the determination, consider the entire record of the proceedings of the Board and, on the basis of the evidentiary record before the Board, as supplemented under paragraph (4) of this subsection, either —

(A) concur in the decision of the Board; or

(B) issue in writing another decision which differs from the decision of the Board to the extent that the Commission finds that, as a matter of law —

(i) the decision of the Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive referred to in subsection (a)(l)(B) of this section, or

(ii) the decision involving such provision is not supported by the evidence in the record as a whole.

(4) In considering any decision of the Board under this subsection, the Commission may refer the case to the Board, or provide on its own, for the taking (within such period as permits the Commission to make a decision within the 60-day period prescribed under this subsection) of additional evidence to the extent it considers necessary to supplement the record.

(5)(A) If the Commission concurs pursuant to paragraph (3)(A) of this subsection in the decision of the Board, the decision of the Board shall be a judicially reviewable action.

(B) If the Commission issues any decision under paragraph (3)(B) of this subsection, the Commission shall immediately refer the matter to the Board.

(c) Within 30 days after receipt by the Board of the decision of the Commission under subsection (b)(5)(B) of this section, the Board shall consider the decision and —

(1) concur and adopt in whole the decision of the Commission; or

(2) to the extent that the Board finds that, as a matter of law, (A) the Commission decision constitutes an incorrect interpretation of any provision of any civil service law, rule, regulation or policy directive, or (B) the Commission decision involving such provision is not supported by the evidence in the record as a whole —

(i) reaffirm the initial decision of the Board; or

(ii) reaffirm the initial decision of the Board with such revisions as it determines appropriate.

If the Board takes the action provided under paragraph (1), the decision of the Board shall be a judicially reviewable action.

(d)(1) If the Board takes any action under subsection (c)(2) of this section, the matter shall be immediately certified to a special panel described in paragraph (6) of this subsection. Upon certification, the Board shall, within 5 days (excluding Saturdays, Sundays, and holidays), transmit to the special panel the administrative record in the proceeding, including —

(A) the factual record compiled under this section

(B) the decisions issued by the Board and the Commission under this section, and

(C) any transcript of oral arguments made, or legal briefs filed, before the Board or the Commission.

(2)(A) The special panel shall, within 45 days after a matter has been certified to it, review the administrative record transmitted to it and, on the basis of the record, decide the issues in dispute and issue a final decision which shall be a judicially reviewable action.

(B) The special panel shall give due deference to the respective expertise of the Board and Commission in making its decision.

Appendix H

(3) The special panel shall refer its decision under paragraph (2) of this subsection to the Board and the Board shall order any agency to take any action appropriate to carry out the decision.

(4) The special panel shall permit the employee or applicant who brought the complaint and the employing agency to appear before the panel to present oral arguments and to present written arguments with respect to the matter.

(5) Upon application by the employee or applicant, the Commission may issue such interim relief as it determines appropriate to mitigate any exceptional hardship the employee or applicant might otherwise incur as a result of the certification of any matter under this subsection, except that the Commission may not stay, or order any agency to review on an interim basis, the action referred to in subsection (a)(1) of this section.

(6)(A) Each time the Board takes any action under subsection (c)(2) of this section, a special panel shall be convened which shall consist of —

(i) an individual appointed by the President, by and with the advice and consent of the Senate, to serve for a term of 6 years as chairman of the special panel each time it is convened;

(ii) one member of the Board designated by the Chairman of the Board each time a panel is convened; and

(iii) one member of the Commission

designated by the Chairman of the Commission each time a panel is convened.

The chairman of the special panel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

(B) The chairman is entitled to pay at a rate equal to the maximum annual rate of basic pay payable under the General Schedule for each day he is engaged in the performance of official business on the work of the special panel.

(C) The Board and the Commission shall provide such administrative assistance to the special panel as may be necessary and, to the extent practicable, shall equally divide the costs of providing the administrative assistance.

(e)(1) Notwithstanding any other provision of law, if at any time after —

(A) the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is not judicially reviewable action under this section or an appeal under paragraph (2) of this subsection;

(B) the 120th day following the filing of an appeal with the Board under subsection (a)(1) of this section, there is no judicially reviewable action (unless such action is not as the result of the filing of a petition by the employee under subsection (b)(1) of this section); or

> (C) the 180th day following the filing of a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, there is no final agency action under subsection (b), (c), or (d) of this section;

an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), or section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)).

(2) If, at any time after the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action, the employee may appeal the matter to the Board under subsection (a)(1) of this section.

(3) Nothing in this section shall be construed to affect the right to trial de novo under any provision of law described in subsection (a)(1) of this section after a judicially reviewable action, including the decision of an agency under subsection (a)(2) of this section.

(f) In any case in which an employee is required to file any action, appeal, or petition under this section and the employee timely files the action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency.

Appendix H

(Added Pub. L. 95-454, title II, § 205, Oct. 13, 1978, 92 Stat. 1140; amended Pub. L. 96-54, § 2(a)(46), Aug. 14, 1979, 93 Stat. 384.)

AMENDMENTS

1979—Subsec. (a)(l)(A). Pub. L. 96-54, § 2(a)(46)(A), substituted "affected" for "effected".

Subsec. (a)(l)(B)(i). Pub. L. 96-54, § 2(a)(46)(B), substituted "2000e-16" for "2000e-16c".

Subsec. (e)(l). Pub. L. 96-54, § 2(a)(46)(C), (D), substituted "of this section" for "of this title" in subpar. (C), and "216(b)" for "216(d)" in provision following subpar. (C).

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96-54 effective July 12, 1979, see section 2(b) of Pub. L. 96-54, set out as a note under section 305 of this title.

EFFECTIVE DATE

Section effective 90 days after Oct. 13, 1978, see section 907 of Pub. L. 95-454, set out as an Effective Date of 1978 Amendment note under section 1101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 7121, 7701, 7703 of this title; title 31 section 753.